



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/157318

PRELIMINARY RECITALS

Pursuant to a petition filed May 01, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milw Cty Dept Family Care - MCO in regard to Medical Assistance, a hearing was held on August 27, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly reduced the Petitioner's supportive home care hours from 97 hours/week to 56 hours/week.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Dena Barbieri

Milw Cty Dept Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. Petitioner's primary diagnosis is advanced dementia. She is 84 years old. The Petitioner requires 24 hour care and supervision 7 days/week. She currently lives alone in an apartment. Her daughter resides in the downstairs apartment.
3. On September 29, 2013, the Petitioner's supportive home care and attendant care hours were increased to 97 hours/week following the death of the Petitioner's husband.
4. Petitioner's most recent Member Centered Plan was developed on February 1, 2014. Long Term Care Outcomes included: member wishes to remain in the least restrictive setting with ADL and IADLs supports in place; member will remain free from skin breakdown with the use of incontinent products; member wishes to have daily structured socialization at ADC with her peers; member wishes to remain in current home with her family caring for her.
5. Petitioner attends adult day care (ADC) 5 days/week, 8 a.m. – 5 p.m. The Family Care program pays for the Petitioner's ADC.
6. On March 13, 2014, the agency issued a Notice of Action to the Petitioner informing her that the agency had determined to reduce her supportive home care and attendant care hours from 97 hours/week to 56 hours/week effective March 28, 2014. The basis for the determination was the ability of the Family Care program to meet the Petitioner's needs in a care setting other than her home in a more cost effective manner.
7. The current cost of the Petitioner's care paid by Family Care exceeds \$6000/month, including the adult day care services, supportive home care and attendant care.
8. On April 21, 2014, the agency issued a notice to the Petitioner informing her that the MCO Grievance and Appeal Committee determined it would reduce her supportive home care and attendant care service hours from 97 hours/week to 56 hours/week.
9. On May 1, 2014, an appeal was filed on the Petitioner's behalf with the Division of Hearings and Appeals.
10. On July 24, 2014, the agency conducted a re-screen of the Petitioner using the LTCFS.

DISCUSSION

The Family Care Program provides appropriate long-term care services for elderly or disabled adults. It is supervised by the Department of Health and Family Services, authorized by Wis. Stat. § 46.286, and comprehensively described in Chapter DHS 10 of the Wisconsin Administrative Code. The process contemplated for an applicant is to test functional eligibility, then financial eligibility, and if both standards are met, to certify eligibility. The applicant is then referred for enrollment in a care management organization (CMO), which drafts a service plan that meets the following criteria:

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

4. Is agreed to by the enrollee, except as provided in subd. 5.
5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under s. DHS 10.53, request department review under s. DHS 10.54, or request a fair hearing under s. DHS 10.55. Pending the outcome of the grievance, review or fair hearing, the CMO shall offer its service plan for the enrollee, continue negotiating with the enrollee and document that the service plan meets all of the following conditions:
 - a. Meets the conditions specified under subds. 1. to 3.
 - b. Would not have a significant, long-term negative impact on the enrollee's long-term care outcomes identified under par. (e) 2.
 - c. Balances the needs and outcomes identified by the comprehensive assessment with reasonable cost, immediate availability of services and ability of the CMO to develop alternative services and living arrangements.
 - d. Was developed after active negotiation between the CMO and the enrollee, during which the CMO offered to find or develop alternatives that would be more acceptable to both parties.

Wis. Admin. Code § DHS 10.44(2)(f).

CMOs must “comply with all applicable statutes, all of the standards in this subchapter and all requirements of its contract with the department.” Wis. Admin. Code, § 10.44(1).

There is no dispute in this case that the Petitioner requires 24 hour care and supervision. The agency pays for Petitioner’s adult day care service from 8 a.m. – 5 p.m., 5 days/week. The agency asserts that it properly reduced the Petitioner’s supportive home care and attendant care hours because the current cost of providing 97 hours/week of care plus adult day care services is not cost-effective. The agency asserts that the current cost of Petitioner’s care to the Family Care program exceeds \$6000/month whereas the monthly cost of care at an assisted living facility or skilled nursing facility would be \$3000-5000.

The majority of the Petitioner’s supportive home care hours consist of supervision time, specifically 62 hours/week of supervision. The remaining 11 hours of SHC includes cleaning, laundry, meal prep and shopping. The Petitioner’s 24 hours/week of attendant care includes assistance with ADLs.

The agency re-assessed Petitioner’s needs at 32 hours of SHC and 24 hours of attendant care. The only change was to the number of hours of supervision that the agency approved. Specifically, the agency previously approved 62 hours/week of supervision; the current assessment is 20 hours/week of supervision. The agency contends that if the Petitioner wishes to remain in her home, the family and other natural supports will need to provide more support to the Petitioner.

The agency testified that it has offered the following options to the Petitioner’s family:

- Choice A: 56-60 hours/week of SHC and Attendant Care plus current daycare services 5 days/week
- Choice B: Supportive independent living Level 4 – 56 hours/week plus current daycare 5 days/week
- Choice C: supportive independent living Level 5 – 70 hours/week, no daycare
- Choice D: self-directed supports based off SHC assessment in Choice A with budget established by Milwaukee County Department of FC.

The agency asserts that the cost of each of these options is approximately the same to the Family Care program and that these are cost-effective options to meet the Petitioner’s needs.

The Petitioner's representatives argued that the Petitioner's condition has not changed and that the agency previously established that 97 hours/week of SHC and attendant care services is a cost effective option to meet the Petitioner's needs. The Petitioner's representatives noted that there was an increase in the Petitioner's hours after her husband died in October, 2013. The Petitioner's husband had provided assistance to her. Prior to his death, the agency provided 73 hours/week of supportive home care and attendant care in addition to adult day care services. After his death, the agency increased the hours to 97 hours/week to make up for the hours of assistance she had received from her husband. The agency conceded that the cost of Petitioner's care at the time it increased the hours in October, 2013 was over \$6000/month.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this matter, the FC agency is trying to change the present state of affairs by reducing Petitioner's supportive home care services, so it has the burden of proving that something about the situation has changed. It is undisputed that the Petitioner's needs have not decreased and have probably increased. Thus, there is no factual basis for reducing the services.

Because the FC agency has not established a factual basis for reducing the Petitioner's supportive home care, it must demonstrate that the law has changed or that it made a legal error when it previously awarded 97 hours of care plus adult day care services per week. If the agency incorrectly interpreted the law in the past, it can correct this error even if it would reduce the Petitioner's benefits because there is no grandfather clause that guarantees the continuation of improperly received benefits. The agency's appeal summary indicates it is following FC guidelines in reducing hours; however, it did not provide any specific guidelines to demonstrate how it determined that 20 hours/week of supervision will meet the Petitioner's needs. It also did not articulate a reason why it found 97 hours/week plus adult day care services to be a cost-effective option for the Petitioner in October, 2013 but that it is no longer cost-effective. It did not articulate whether it had considered other natural supports at the time it made that determination and why it determined those supports were not available then but are available now. The policy regarding use of natural supports has not changed since its previous determination. Based upon this, I find that the agency has neither shown that the Petitioner's needs have declined nor that it incorrectly determined those needs in the past. Therefore, it must continue to provide 97 hours of supportive home care/attendant care and adult care day services/week.

This decision does not prohibit the agency from making changes to the Petitioner's hours in the future but the agency must make a proper showing of why it is making those changes and must demonstrate that the Petitioner's needs and outcomes will be met.

CONCLUSIONS OF LAW

The agency did not properly reduce the Petitioner's supportive home care/attendant care services to 56 hours/week.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind its Notice of Action reducing the Petitioner's SHC/attendant hours to 56 hours/week and restore the level of services to 97 hours/week in addition to adult day care services. This action shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

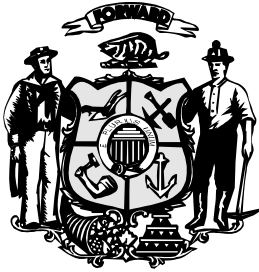
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 4th day of September, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 4, 2014.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion
Attorney Matthew Hayes